ESTTA Tracking number: **ESTTA848756**

Filing date: **09/27/2017**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91234467
Party	Defendant BGK Trademark Holdings, LLC
Correspondence Address	MARVIN S PUTNAM LATHAM & WATKINS LLP 10250 CONSTELLATION BLVD STE 1100 LOS ANGELES, CA 90067 UNITED STATES Email: marvin.putnam@lw.com, laura.washington@lw.com, jonathan.sandler@lw.com, john.eastly@lw.com
Submission	Reply in Support of Motion
Filer's Name	Marvin S. Putnam
Filer's email	marvin.putnam@lw.com, laura.washington@lw.com, jonathan.sandler@lw.com, john.eastly@lw.com
Signature	/Marvin S. Putnam/
Date	09/27/2017
Attachments	2017.09.27. Reply in Further Support of Motion for Entry of Protective Order.pdf(150089 bytes)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In the Matter of Trademark Application Serial No. 86883293: BLUE IVY CARTER
Published in the Official Gazette of January 10, 2017 in all designated classes
(International Classes 3, 6, 9, 10, 12, 16, 18, 20, 21, 24, 26, 28, 35, and 41).

BLUE IVY, Opposer, v. BGK TRADEMARK HOLDINGS, LLC, Applicant.	Opposition No. 91234467 Serial No. 86883293 Mark: **BLUE IVY CARTER**

REPLY IN FURTHER SUPPORT
OF MOTION FOR ENTRY OF PROTECTIVE ORDER

Finding itself without a defensible position, opposer resorts to ignoring the law and distorting BGK's reasons for requesting a heightened protective order. BGK is not seeking to "seal off this proceeding almost entirely from the public." *See* Blue Ivy's Opposition to Applicant's Motion for Entry of a Modified Protective Order ("Opp.") at 2. It is not proposing that all documents filed in this proceeding be sealed. Nor is it seeking terminating sanctions as a possible remedy so it can obtain "dismissal of this action based on a technicality." *See id.* Rather, BGK requested modifications to the protective order to ensure that information designated confidential and materials disclosed in discovery—***that the public has no right to access***—remain private and confidential. And it requests that terminating sanctions be available for violating the protective order, because without this remedy, there is a real possibility that opposer and its counsel will freely disclose confidential and private information.

Opposer's refusal to keep confidential the date, time, and location of Mrs. Carter's deposition, and its vigorous opposition to this Board having the discretion to impose terminating

sanctions for a violation of the protective order is frankly baffling, and causes BGK to seriously question opposer's motives. If opposer truly brought this opposition in good faith, then:

- What valid interest could opposer possibly have in publicizing the time, date, and location of Mrs. Carter's deposition?
- What valid interest could opposer have in publicizing irrelevant facts about Mrs. Carter's private life?
- Why does it oppose terminating sanctions as a remedy for a violation of the protective order, if it does not intend to violate it?

BGK cannot think of any explanation for opposer's unreasonable positions other than a desire to harass BGK's principal, Mrs. Carter, and disclose her confidential information to the public.

BGK's requested modifications to the protective order are thus necessary to protect and ensure the privacy and safety of Mrs. Carter and her family. First, BGK's interest in protecting Mrs. Carter's privacy and safety—by keeping the date, time, and location of her deposition confidential—outweighs any public interest here. In fact, there is *no* public interest, as the public has no right of access to discovery. Second, opposer's objections to BGK's proposed definition of "Confidential" stem from its own misconceptions and are unwarranted. Had opposer met and conferred in good faith, instead of striking BGK's proposed definition of "Confidential" wholesale, BGK would have clarified that it is not seeking a "gag order" and fully intends to mark prominently any materials it deems confidential. Finally, BGK's request that this Board confirm (what the law already provides) that it has the discretion to issue terminating sanctions for violation of the protective order is reasonable and will ultimately deter the disclosure of confidential information.

ARGUMENT

A. BGK's Interest In Protecting Mrs. Carter's Privacy And Safety Outweighs Opposer's Invented Public Right To Access Discovery.

Ignoring well-established precedent, opposer claims—notably without any supporting authority—that all discovery in this matter must be public. *See* Opp. at 2-5. That is not the law. The public does not have a right to access discovery. Yet, opposer demands that this Board find that this nonexistent "public right" somehow outweighs BGK's interest in protecting Mrs. Carter's privacy and her family's physical safety. *Id.* But it cannot. Here, because there is no public right to consider and because BGK has met its burden by detailing its concerns for Mrs. Carter and her family's privacy and safety, the Board should exercise its "flexibility in balancing and protecting the interests of private parties" and grant BGK's request for a modified protective order. *United States ex rel. Brown v. Celgene Corp.*, No. CV 10-3165 GHK (SS), 2016 WL 6542729, at *4 (C.D. Cal. March 14, 2016) (quoting *Kamakana v. City and Cty. of Honolulu*, 447 F.3d 1172, 1180 (9th Cir. 2006)); *accord Baystate Techs., Inc. v. Bowers*, 283 F. App'x 808, 810 (Fed. Cir. 2008).

1. There Is No Public Right Of Access To Discovery.

Discovery is not a "public proceeding" to which there is a "public[] right of access." *See* Opp. at 5. "[P]rivate documents collected during discovery are not judicial records"; therefore, "the right of access to pleadings, docket entries, orders, affidavits or depositions *duly filed* . . . does not extend to information collected through discovery which is not a matter of public record." *In re Alexander Grant & Co. Litig.*, 820 F.2d 352, 355 (11th Cir. 1987) (internal quotation marks omitted) (emphasis in original); s*ee also Celgene Corp.*, 2016 WL 6542729, at *4 ("When determining whether and to what extent information may be shielded from public view, courts distinguish between materials produced during discovery but not filed with the court

versus materials attached to 'judicial records.'"); *Takata v. Hartford Comp. Emp. Ben. Serv. Co.*, 283 F.R.D. 617, 620 (E.D. Wa. 2012) ("Discovered, but not yet admitted, materials are not a 'traditionally public source of information.'").

If the facts learned in discovery are not open to the public, than surely ***when*** and ***where*** discovery is collected is not open to the public. Indeed, discovery requests and responses are not filed on the public docket—they are ***served***. *See* TBMP §§ 404 – 407. Discovery is, thus, by TTAB mandate ***not*** part of the public trademark application record. *See* 37 C.F.R. § 2.27. The public has no right of access to it.

Moreover, the United States Supreme Court has made clear that "pretrial depositions and interrogatories are ***not public*** components of a civil trial." *Seattle Times Co .v. Rhinehart*, 467 U.S. 20, 33 (1984) (emphasis added). Opposer's claim that it is somehow championing "the longstanding principle that trademark proceedings should be laid open to the public" by refusing to keep confidential the time, date, and location of Mrs. Carter's deposition is absurd. *See* Opp. at 5. That "longstanding principle" does not exist with respect to depositions. *Seattle Times Co.*, 467 U.S. at 33 ("restraints placed on discovered, but not yet admitted, information are not a restriction on a traditionally public source of information"). The public does not have a right to attend a deposition. *See, e.g.*, *Kimberlin v. Quinlan*, 145 F.R.D. 1, 1-2 (D.D.C. 1992) (rejecting CNN's motion to attend and video tape a deposition of former public officials); *Times Newspapers Ltd. (Of Great Britain) v. McDonnell Douglas Corp.*, 387 F.Supp. 189, 197 (C.D. Cal. 1974) ("[D]epositions before a qualified officer in an equity or law case are not a judicial trial, nor a part of a trial, but a proceeding preliminary to a trial, and neither the public nor representatives of the press have a right to be present at such taking.").

Furthermore, restricting public access to depositions is logical and comports with this Board's rules governing the designation of deposition testimony. A party cannot designate the content of a deposition confidential until ***after*** it has happened. *See* Mot., Ex. C § 9. Yet, adopting opposer's inane rule would create a situation that would (upon opposer's invitation) allow any media outlet to advertise in advance, attend, and publish Mrs. Carter's entire deposition ***before*** BGK could designate the transcript "confidential" for purposes of the *inter partes* proceeding. Nonsense. The very practice of designating deposition testimony as confidential mandates that the process of collecting discoverable information be closed to the public, so that the parties may determine whether any part of the deposition must be designated confidential.

Nevertheless, BGK is not even seeking to designate the potential deposition of Mrs. Carter confidential.[1] BGK is merely seeking to prevent opposer from making good on its threats to publicize the time, date, and location of any such deposition. *See* Opp. at 5 ("It is true that Blue Ivy has informed BGK that it will not agree to keep [the logistics of Mrs. Carter's deposition] secret from the public."). The public does not have a right to this information. This Board should order opposer and its counsel to keep this information confidential, as its motives for disclosure can only be malicious.

2. BGK Demonstrated The Need For A Modified Protective Order.

While it is true that BGK is required to make a "particular and specified demonstration of fact" to obtain the relief it seeks, opposer wholly misrepresents what that showing requires. *See* Mot. at 2-4; *Phillies v. Phila. Consol. Holding Corp*., 107 U.S.P.Q.2d 2149, 2152 (T.T.A.B. 2013). Opposer claims BGK needed to attest to "[h]ow much would [Mrs. Carter's security]

[1] As stated in its motion, such relief is premature, given that she has not yet testified. Mot. at 6 n.6.

cost" and "[h]ow often [] paparazzi [are] 'camped outside' her home" before it could obtain reasonable modifications to the protective order. It is precisely that type of invasive and irrelevant information that opposer appears to be after, which BGK's proposed protective order seeks to ***prevent*** opposer from publicizing.

BGK does not need to provide declarations attesting to the precise details concerning Mrs. Carter's personal security measures to support its motion. *See* Opp. at 4-5. None of opposer's purported authorities states that a party seeking to modify the Board's default protective order needs to submit supporting evidence. *See e.g., Edmondson v. Velvet Lifestyles, LLC*, No. 15-24442-CIV-Lenard/Goodman, 2016 WL 7048363, at *9-10 (S.D. Fla. Dec. 5, 2016) (Opp. at 3) (claim of associational privilege requires evidentiary showing); *Cipollone v. Liggett Grp., Inc.*, 785 F.2d 1108, 1121 (3d Cir. 1986) (Opp. at 4) (no discussion about evidentiary showing); *FMR Corp. v. Alliant Partners*, 51 U.S.P.Q.2d 1759, 1761 (T.T.A.B. 1999) (Opp. at 3) (party seeking to prevent deposition of person at "apex" of company required to file declaration of no knowledge). Nor do the Federal Rules of Civil Procedure, the relevant federal regulations, or the Board's Manual of Procedure mandate the inclusion of a supporting affidavit. Fed. R. Civ. P. 26(c)(1); 37 C.F.R. § 2.120(g); TBMP §§ 412, 526.

Rather, BGK simply needed to provide more than "stereotyped and conclusory statements" to support its position.[2] *See Phillies*, 107 U.S.P.Q.2d at 2152. It has done so.

---

[2] The authority opposer relies on to support its contention that BGK needed to provide more is inapposite. In *Phillies v. Philadelphia Consol. Holding Corp.*, 107 U.S.P.Q.2d 2149, 2152 (T.T.A.B. 2013), the movant claimed in conclusory fashion that it should be relieved of responding to 507 RFAs, because it would be "unduly burdened in both time and expense given the large number of requests for admission." And in *Gold Coast Prop. Mgmt., Inc. v. Valley Forge Ins. Co.*, 2010 U.S. Dist. LEXIS 145837, at *5-18 (S.D. Fla. Jan. 26, 2010), plaintiff made sufficiently specific arguments, but ultimately failed to prove documents it claimed were privileged should not be produced. Neither of the failed motions in those cases is anything like BGK's motion for a modified protective order. BGK provided specific and particularized

Indeed, opposer helpfully provides a bulleted list of the specific and particularized reasons animating BGK's concerns. *See* Opp. at 3-4 (listing specific privacy concerns, safety concerns, costs to protect family, pandemonium, presence of media outlets, and harassment).[3] These privacy and safety concerns cannot be dismissed (as opposer contends) as "a mere trifle." *See* Opp. at 5 (citing *Gold Coast Prop. Mgmt., Inc. v. Valley Forge Ins. Co*., No. 09-60029-CIV, 2010 U.S. Dist. LEXIS 145837, at *2 (S.D. Fla. Jan. 26, 2010)). [4]

BGK has shown that a modified protective order is required in this matter to: (1) protect its confidential information; and (2) protect Mrs. Carter and her family from having the press invited to their potential depositions. Opposer can point to no legitimate countervailing interest, as ***there is no public right of access to discovery***. The balance clearly tips in BGK's favor, and the request for a modified protective order should be granted. *See Baystate Techs.*, 283 F. App'x at 810.

B. Had Opposer Productively Met and Conferred, Its Objections To BGK's Proposed Definition Of "Confidential" Could Have Been Resolved.

Opposer's objections to BGK's proposed definition of "Confidential" and treatment of confidential materials are based on two misapprehensions: (1) that BGK is the alter ego of Mrs. Carter (it is not); and (2) that BGK does not intend to clearly designate materials confidential. Neither is correct. These misconceptions could have been clarified had opposer conferred in

---

reasons that a potential deposition of Mrs. Carter or her family members should not be public: *inter alia*, safety, privacy, and security expenses. *See* Mot. at 7-9.

[3] Inexplicably, opposer tries to dismiss BGK's security concerns with the claim that other "celebrities" have sat for depositions "in law offices without incident." Opp. at 9. Opposer, however, fails to address whether the date, time, and location of those depositions were public. Given that the public has no right of access to discovery, it is extremely likely that they occurred without incident because they were ***not public.***

[4] Opposer's contention that it should be allowed to publicize Mrs. Carter's deposition because Mr. and Mrs. Carter are seemingly not concerned about their privacy because they attend sporting, charity, and various other social events is preposterous. *See* Opp. at 9.

good faith with BGK. Instead, opposer struck BGK's proposed revision to the definition of "Confidential" in its entirety and without explanation. *See* Mot., Ex. C; *see also* Washington Decl., Ex. 2. If it had line edits that it wished to see instituted, opposer was free to propose those revisions or ask for clarification. It refused to do so. As a result, its opposition contains unnecessary objections based upon its complete misinterpretation of BGK's proposed revisions to the definition of "Confidential" and its treatment of confidential materials. BGK provides the following clarity.

First, opposer's claim that the proposed definition of "Confidential" is akin to a "gag order" is apparently borne of its misunderstanding that BGK is the alter ego of Mrs. Carter. *See* Opp. at 7.[5] It is not. As explained in BGK's opposition to opposer's motion to compel, BGK is a very real corporate entity, with individuals—other than Mrs. Carter—who operate it. *See* Opp. to Mot. to Compel. at 10 n.7. As such, in the definition of "Confidential," BGK is not listed as an entity whose information is to be automatically given confidential treatment. *See id.* In contrast, Mrs. Carter, her family, and her other business entities ***are*** listed as parties about whom private and non-public business information is to be given confidential treatment. *Id.* As such, BGK's proposed definition of "Confidential" is not a gag order. Rather, BGK's proposed definition seeks to ensure that irrelevant information about Mrs. Carter's non-public business dealings and private life is kept confidential. *See* Mot., Ex A.

Second, opposer's claim that BGK has "demand[ed]" confidential treatment for information not designated as confidential is another misunderstanding. *See* Opp. at 8. It has

---

[5] Moreover, opposer's claim that BGK is somehow using the breadth of the definition of "Confidential" to thwart discovery is false. *See* Opp. at 7. BGK fully intends to comply with its discovery obligations, but BGK cannot respond to discovery absent an agreed definition of Confidential. *See* Opp. to Mot. to Compel. at 12-15. Without an agreed definition, BGK cannot accurately designate its responses.

never been BGK's intention not to designate materials as "Confidential" that it wishes to be treated as such. Once the Board determines which definition of "Confidential" applies, BGK will prominently stamp or mark confidential materials as necessary, and opposer will not have to engage in any of the guesswork it fears. This is standard practice.

C. BGK Only Requests That Terminating Sanctions Be An Available Remedy For Deserving Violations Of The Protective Order.

Opposer falsely claims that BGK seeks terminating sanctions for all breaches of the protective order, regardless of severity. *See* Opp. at 10. Not so. This requested modification does not state that a breaching party "***shall***" be punished with "dismissing this action in whole or in part." *See* Mot., Ex. A (emphasis added). Rather, it states that a breaching party "***may***" be punished by "appropriate measures, including" dismissal. *See id.*, Ex. A (emphasis added). This is nothing more than a restatement of Federal Rule 37, which is cross-referenced by this Board's rules and which the Board may apply. *See* Mot. at 9-10. In any event, opposer should not fear dismissal of this action on a mere technicality, as BGK intends to mark prominently materials it is designating as Confidential. Thus, disclosing BGK's confidential materials would not be an accident, but an intentional violation of the protective order. Unless opposer intends to violate the protective order, the addition of this remedy, which only confirms that the Board has the power to use its discretion and impose terminating sanctions, should be a non-issue. The fact that opposer has made it one only heightens the need for the inclusion of terminating sanctions to deter the disclosure of confidential materials.

CONCLUSION

For the foregoing reasons, and those stated in BGK's motion, BGK respectfully requests that the Board issue the protective order attached thereto as Exhibit A. In the alternative, BGK requests that the Board issue the protective order attached thereto as Exhibit B and an order

mandating that opposer keep confidential all information related to the logistics of any possible depositions of Mrs. Carter and/or her family.

Dated: September 27, 2017

LATHAM & WATKINS LLP

By: /Marvin S. Putnam/

Marvin S. Putnam (Bar No. 212839)
Marvin.Putnam@lw.com
Laura R. Washington (Bar No. 266775)
Laura.Washington@lw.com
10250 Constellation Boulevard, Suite 1100
Los Angeles, California 90067
Telephone: +1.424.653.5500
Facsimile: +1.424.653.5501

Attorneys for Applicant
BGK Trademark Holdings, LLC

CERTIFICATE OF SERVICE

I, John Eastly, hereby certify that on September 27, 2017, I served a true and correct copy of the foregoing

- **REPLY IN FURTHER SUPPORT OF MOTION FOR ENTRY OF PROTECTIVE ORDER**

by electronic mail upon:

Ryan E. Hatch, Esq.
13323 W. Washington Blvd., Suite 100
Los Angeles, CA 90066
Telephone: (310) 435-6374
Facsimile: (312) 693-5328
Email: ryan@ryanehatch.com

Counsel for Opposer
Blue Ivy

_ /John M. Eastly/
John M. Eastly